April 4, 2001

Ms. Laura Garza Jimenez
Nueces County Courthouse
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2001-1331

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145616.

The Nueces County Sheriff's Department (the "department") received a request for documents regarding two incidents involving Sergeant Gayle C. Ferguson and four previous disciplinary actions taken against Sgt. Ferguson. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code and under the Texas Medical Practices Act (the "MPA"). We have considered the exceptions you claim and reviewed the submitted information.

First, you contend that the document in Exhibit D is excepted from public disclosure by the common law right to privacy. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. After reviewing the submitted information, we conclude that certain information in Exhibit D, which we have marked, must be withheld under section 552.101 and the doctrine of common law privacy.

Next, you claim that the information in Exhibits E and F is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
>
> . . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the department must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). On the other hand, this office has determined that if an individual publicly

threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In this instance, you have submitted a copy of an employee grievance form filed by Sgt. Ferguson on August 16, 2000, with respect to a two-day suspension he received after an incident that occurred on July 9, 2000. Unlike filing a complaint with the EEOC, the act of filing a grievance with the department is not an objective step taken towards litigation. *See, e.g.,* Open Records Decision No. 336 (1982). Moreover, although the grievance form indicates that Sgt. Ferguson is represented by an attorney, it does not include any threat by Sgt. Ferguson to sue the department with respect to his grievance. Based on these facts, we believe that litigation with respect to Sgt. Ferguson's grievance was not reasonably anticipated at the time of the request.

In addition, you state that litigation "is pending or was reasonably anticipated in 1998." You have submitted a copy of a petition filed by Sgt. Ferguson in 1998, and a copy of an application for temporary injunction and proposed order filed by Sgt. Ferguson in the same matter on February 2, 2000. You have not, however, indicated that the suit instituted by Sgt. Ferguson in 1998 remained pending at the time of his request for information. Assuming, however, that this suit remained pending as of January 19, 2001, we must next examine whether the requested information is related to the pending litigation. "Ordinarily, the words 'related to' mean 'pertaining to,' 'associated with' or 'connected with.'" *University of Tex. Law Sch. v. Texas Legal Found.,* 958 S.W.2d 479, 483 (Tex. App.--Austin 1997, no pet.). The suit filed by Sgt. Ferguson in 1998, concerns Sgt. Ferguson's failure to be selected for the position of training officer at the department in March 1996. The documents in Exhibits E and F, which you seek to withhold under section 552.103, do not appear to relate to Sgt. Ferguson's failure to be hired as a training officer in 1996. You have not explained how Exhibits E and F "relate" to the litigation. Therefore, we find that you have not met your burden of demonstrating that the documents in Exhibits E and F are related to the suit instituted by Sgt. Ferguson in 1998, and that these documents may not be withheld under section 552.103. Thus, the department must release the documents in Exhibits E and F to the requestor.

Finally, you argue that the document in Exhibit G is made confidential under the Medical Practices Act (the "MPA"). As discussed above, section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses confidentiality provisions such as section 159.002 of the Occupations Code, known as the MPA. The MPA provides in relevant part:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

> (c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). Upon review of the submitted information, we conclude that the document in Exhibit G is a medical record subject to the MPA, and may be released only in accordance with that statute.

To summarize: (1) the department must withhold the marked information in Exhibit D pursuant to section 552.101 and the doctrine of common law privacy; (2) the department must release the documents in Exhibits E and F to the requestor; and (3) the department may release the document in Exhibit G only in accordance with the MPA.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/er

Ref: ID# 145616

Encl: Marked documents

cc: Mr. Gayle C. Ferguson
5902 Ayers Street #270
Corpus Christi, Texas 78415-2236
(w/o enclosures)